In the

SUPREME COURT OF THE UNITED STATES

October Term, 1974

FEB 14 1975
MICHAEL RODAK, JR., CLERK

No. 74-941

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK and JOHN A. MURPHY,

Petitioners,

-against-

JOHN F. LOMBARD,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTORARI

MICHAEL B. STANDARD
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New York, New York 10017

February 10, 1975

In the

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THE BOARD OF EDUCATION OF THE CITY OF NEW YORK and JOHN A. MURPHY,

Petitioners,

-against-

JOHN F. LOMBARD,

Respondent.

Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

The respondent, John F. Lombard, opposes the granting of a petition for certiorari in this matter for the following reasons:

1. The state court judgment entered in a special proceeding in the nature of mandamus, did not and could not have, determined the constitutional issues raised in the Federal action.

2. The petitioners' base their argument that a conflict exists between the

appellate courts between the circuits through a misinterpretation of the Second Circuit's holding herein and the principles set forth by the appellate courts in other circuits upon facts which are dissimilar to those at bar.

Firstly, the respondent's state action in the nature of a mandamus sought to annul and set aside an administrative determination on the ground that it was arbitrary, capricious and unreasonable. The action was a so-called "Article 78" proceeding pursuant to Sections 7801, et seq. of the New York Civil Practice Law and Rules. Section 7803 of the state statute limits application of the article as follows:

> "Section 7803
>
> "The only question that may be raised in proceeding under this article are:
>
> "Whether the body or officer failed to perform a duty enjoined upon it by law; or
>
> "Whether the body or officer proceeded, is proceeding or is about to proceed without or in excess of jurisdiction; or
>
> "Whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure of mode of penalty or discipline imposed; or
>
> "Whether a determination was made as a result of a heading held, and at which

> evidence was taken, pursuant to direction by law is, on the entire record, supported by substantial evidence. As amended L. 1962, c. 318, Sec. 26."

The state court proceeding was not a proper vehicle to test constitutionality. Matter of Jerry v. Board of Education, 44 A.D. 2d 198 (4th Dept., 1974); Robbins v. Police Pension Fund, 321 F. Supp. 93.

The authorities relied upon by the petitioner do not apply to the case at bar. The core of each of the cases cited by the petitioner is that the state court judgment was entered either after trial or upon review of an administrative hearing which comported with due process standards. Mr. Lombard never received a hearing or trial, at the administrative or state court level. Although the petitioner makes frequent reference (as does the Comment in 88 Harvard Law Review 453 cited by petitioner) to the hearing accorded the respondent, as pointed out by the Second Circuit at no time was any sworn testimony taken and no witnesses appeared on behalf of the petitioners here. (Opinion, Appendix A at p. 7a, 15a.) In Lovely v. Laliberte, 498 F. 2d 1261 (1st Cir., 1974) the state court judgment had been entered after trial; in Frazier v. East Baton Rouge Parish School Board, 363 F. 2d 861 (5th Cir., 1966), the appellant had a full hearing prior

to dismissal and the School Board's action was sustained by the state court after a full hearing in state court. Howe v. Brouse, 422 F. 2d 347 (8th Cir., 1970) was decided on the issue of judicial immunity in the state court, and the same issue was pivotal to the Federal action. In Johnson v. Department of Water & Power of the City of Los Angeles, et al., 450 F. 2d 294 (9th Cir., 1971), the appellant received a hearing and a rehearing before the state civil service commission. The court in Johnson specifically held that the appellant had every opportunity to present his side of the case in the state courts. The respondent here was able only to present the issue of arbitrariness of the administrative determination in the state court. In Francisco Enterprises v. Kirby, 482 F. 2d 481 (9th Cir., 1973), there was a full hearing before an impartial hearing officer at the administrative level.

The petitioners also misconstrue the holding in Thistlewaite v. City of New York, 497 F. 2d 138 (2d Cir., 1974), cert den. Docket #74-524, 43 U.S.L.S. 3355, December 24, 1974. In Thistlewaite, the appellant had been convicted after trial at which all constitutional questions presented to the District Court were determined by the state court. Further, the Thistlewaite case involved collateral attack upon a state court criminal conviction and is inapposite here.

Nor is Tang v. Appellate Division, First Department, 487 F. 2d 138 (2d Dept., 1973), cert. den. 416 U.S. 906 (1974) supportive of the petitioners' argument here. In Tang it was conceded that the appellant raised the same constitutional issues in his state and federal actions. There was also the additional element that of the state court's administration of the state bar which appeared to influence the federal court's decision not to pass on the issues presented to it.

The petitioners' reliance upon Angel v. Bullington, 330 U.S. 183 (1946) is misguided. That decision dealt with the standing of parties in an action where diversity of citizenship was the basis of federal jurisdiction. This Court held that for purpose of diversity jurisdiction a federal court is in effect only another court of the state. This statement, of course, does not apply to actions under the Civil Rights Act which clearly supplementary to available state jurisdiction. Nor does this Court's holding in Prieser v. Rodrigues, et al., 411 U.S. 475 (1973) constitute authority for the petitioners' argument here. The burden of the Prieser holding was that where state prisoners seek to challenge state "good time" procedures, their remedy is by habeas corpus and consequently they must exhaust state remedies before invoking federal jurisdiction.

Clearly, the state proceeding to review an administrative determination on the grounds that it is "arbitrary, capricious and unreasonable" (NYCPLR, Sec. 7803) is not the same cause of action as the respondent's suit under the Civil Rights Act. The first action goes to the weight of proof before the administrative body and the second to the very core of First and Fourteenth Amendment rights.

The petitioners' statement that if the decision here is allowed to stand the result will be multiple court actions cannot withstand logical application. It goes without saying that multiple litigation is more of a burden on the person in the respondent's position than upon the petitioners. No plaintiff seeks multiple suits with the concomitant expenditure of time and money that such necessarily entails. The fact is that a firm federal holding as to the respects in which the procedures of the Board of Education here violated federal due process requirements will necessitate a change in that petitioner's procedures and thus diminish both state and federal court litigation because abuses such as those set forth in the complaint herein are not peculiar to the respondent's case and have in fact resulted in the commencement of litigation by others similarly affected.

The actions taken by the petitioners here in revoking the respondent's probationary

license and stigmatizing him as a mentally ill person without a hearing, sworn testimony, an opportunity for him to confront the witnesses against him and an opportunity to cross examine them, all under color of state law, is manifestly the very type of abuse that the federal statute seeks to provide redress for.

The constitutional question was not raised, briefed or decided in the state courts. The New York statute precluded state court jurisdiction over the constitutional issue and the state court's judgment does not stand in bar of the federal action.

On the facts, there is no conflict on the issue here presented between the Circuit Courts of Appeals. Each of the cases cited by the petitioners as in conflict with the decision at bar is clearly distinguishable on its facts. The rule as set forth in Kaufman v. Moss, 420 F. 2d 1270 (3rd Cir.), cert. den. 400 U.S. 846, cited with favor in Mastraccio v. Ricci, 498 F. 2d 1257 (1st Cir., 1974) is, "...reasonable doubt as to what was decided by a prior judgment should be desolved against using it as

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI TO REVIEW THE JUDGMENT AND OPINION OF THE SECOND CIRCUIT SHOULD BE DENIED.

Respectfully submitted,

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Dated: February 10, 1975.